Filed 8/30/13 Sirius International Ins. Corp. v. Superior Court CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SIRIUS INTERNATIONAL INSURANCE CORP. ET AL.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

LARRY SHAW,

Real Party in Interest.

E058367

(Super.Ct.No. CIVVS1203381)

OPINION

ORIGINAL PROCEEDINGS; Petition for writ of mandate. Margaret A. Powers, Judge. Petition granted.

Musick, Peeler & Garrett, Cheryl A. Orr and Jennifer C. Kalvestran for Petitioners

No appearance for Respondent.

Shernoff Bidart Echeverria Bentley, William M. Shernoff and Samuel L. Bruchey for Real Party in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

Petitioners moved to dismiss this action on forum non conveniens grounds based on a forum selection clause contained in the insurance policy at issue. The trial court denied the motion, indicating that the provision was unreasonable "because the contract is so one-sided in allowing the defendants to basically pick any forum they like and causing the plaintiff to have to only use the one forum."

Using the trial court's rationale, almost all forum selection clauses would be rendered unenforceable. This is clearly not the state of the law in California. "No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length. For the foregoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-496.)

The party opposing the enforcement of the forum selection clause bears the burden of proof. (*CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354 (*CQL*); see also *Smith, Valentino & Smith, Inc. v. Superior Court, supra*, 17 Cal.3d at p. 496; but see *America Online, Inc. v. Superior Court* (2001)

90 Cal.App.4th 1, 10 [holding that the burden shifts where the plaintiff is seeking relief under the California Consumers Legal Remedies Act].) "Given the significance attached to forum selection clauses, the courts have placed a substantial burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case. (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493.)" (*CQL, supra,* 39 Cal.App.4th at p. 1354.)

Enforcement of the clause may be shown to be unreasonable if it is shown that the forum selected would be unavailable or unable to accomplish substantial justice. Moreover, the choice of forum must have some rational basis in light of the facts underlying the transaction. "However, 'neither inconvenience nor additional expense in litigating in the selected forum is part of the test of unreasonability.' [Citations.] Finally, a forum selection clause will not be enforced if to do so will bring about a result contrary to the public policy of the forum." (*CQL, supra,* 39 Cal.App.4th at p. 1354.)

First, it is important to determine whether the forum selection clause in this case is mandatory or permissive. If there is no mandatory forum selection clause, the court weighs a gamut of factors of public and private convenience in ruling on a forum non conveniens motion. Not even a "mandatory" forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum. However, if there is a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294.)

The trial court did not make an express finding whether the forum selection clause in this case is mandatory or permissive. No specific words are required: "Any language that reasonably conveys the parties' intention to select an exclusive forum will do." (*Water Energizers Ltd. v. Water Energizers, Inc.* (S.D.N.Y. 1992) 788 F.Supp. 208, 212; see also *Docksider, Ltd. v. Sea Technology, Ltd.* (9th Cir. 1989) 875 F.2d 762, 763-764 [rejecting contention that contractual language must contain express term such as "exclusively" to make forum selection clause mandatory, stating "the prevailing rule is clear . . . that where venue is specified with mandatory language the clause will be enforced"].) In *Docksider*, the clause stated that venue "shall" be deemed to be in Virginia, and that was held to be mandatory. We believe that the language in section 6 of the certificate of insurance when read in its entirety, as well as the subscription in the application for insurance, resembles the language used in the *Docksider* case and evinces an intent that the forum selection clause be mandatory.

Therefore, the forum selection clause is enforceable unless real party in interest has shown it to be unreasonable or contrary to public policy. Real party raises the issue of the unconscionability, both procedural and substantive. We note that he did not expressly raise this issue in the trial court.[1] [2] Real party claims procedural

[1] Real party also raises for the first time in its informal response that petitioners are precluded under Insurance Code section 1616 from seeking relief because they are not properly registered. He fails to provide evidence to support those facts. Indeed, the claim is based solely on counsel's argument with references to Web sites, and he even fails to request this court to take judicial notice of information on those Web sites, assuming arguendo it would be proper for us to do so.

unconscionability due to surprise, arguing that petitioners failed to show that he was ever given a copy of the master policy or the certificate of insurance. Even if they had, they did not show that he ever saw a copy prior to purchasing insurance. However, he never made the claims in the trial court that he was never given nor saw the certificate or policy and, as petitioners point out, he provides no evidence to support them here. He has forfeited these claims. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 [only when the issue presented involves purely a legal question on an uncontroverted record and requires no factual determination, is it appropriate to address new theories on appellate review].)

In this same vein, real party contends procedural unconscionability should be found based on the application for insurance, which he claims hides the forum selection clause. However, he need not have actually read or been aware of the provision to be bound by it so long as he had a reasonable opportunity to familiarize himself with the terms. This appears to be a factual question. (*Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 558-559.)

Real party claims unconscionability because the master policy is clearly an adhesive, form contract. Forum selection clauses are enforceable even when they are

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*[footnote continued from previous page]*

**2** Real party also contends that the motion to dismiss was untimely. This contention was raised in the trial court. The trial court did not expressly rule on the timeliness issue, but we must presume that it implicitly found that the motion was timely since it ruled on the merits. It was not unreasonable for it to find the motion was timely based on petitioner's attorney's understanding of the terms of the extension of time granted by real party's counsel.

contained in an adhesion contract—"a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms." (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 201; see also *Aral v. Earthlink, Inc.* (2005) 134 Cal.App.4th 544, 558.)

With regard to the substantive unconscionability claim, real party contends that it is one-sided and benefits only petitioners because there is virtually no likelihood that they would ever need to sue a policyholder. This is not self-evident—they may well sue policyholders for fraud and/or to recover benefits improperly paid. This issue overlaps into the reasonableness of the forum selection clause. As petitioners argue, it is entirely reasonable for a company that issues an international policy to pick one location for suit. (*Faur v. Sirius Int'l Ins. Corp.* (N.D. Ill 2005) 391 F.Supp.2d 650, 653.)

Because the trial court's ruling seems to be based entirely on a finding that the clause is one-sided and adhesive, we grant the petition for the reasons discussed above. When reconsidering the motion, the trial court is not precluded from considering other factors that might be relevant to a determination whether enforcement of the clause would otherwise be unreasonable or in violation of public policy.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to set aside its order denying the motion to dismiss on grounds of forum non conveniens and to reconsider the motion in light of this order.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioners to recover their costs.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.